

Message Text

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ACTION L-02

INFO OCT-01 EUR-12 ISO-00 SCA-01 JUSE-00 SS-15 NSC-05 SP-02

CIAE-00 INR-07 NSAE-00 /045 W
----- 072798

P 171857Z JUN 75

FM AMEMBASSY PARIS

TO SECSTATE WASHDC PRIORITY 0470

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E.O. 11652: N/A

TAGS: CPRS, PFOR, FR

SUBJECT: HOLDER-KERKOW EXTRADITION

REF: PARIS 15671

1. FOLLOWING IS REWORKED DRAFT NOTE DISCUSSED REFTEL:
A. (BEGIN TEXT) THE EMBASSY ... AND HAS THE HONOR
TO REFER TO THE EMBASSY'S NOTE NO. 27 OF FEBRUARY 26,
1975 REQUESTING THE EXTRADITION TO THE UNITED STATES
OF WILLIE ROGER HOLDER AND MARY KATHERINE KERKOW AND
TO THE MINISTRY'S NOTE NO. 8595 OF MAY 22, 1975 TRANS-
MITTING THE DECISION OF THE CHAMBRE D'ACCUSATION OF
THE COUR D'APPEL OF PARIS DATED APRIL 14, 1975 REFUSING
THE REQUESTED EXTRADITION.
B. THE EMBASSY NOTES THAT THE DECISION OF THE
CHAMBRE D'ACCUSATION REGARDING THE QUESTION OF EXTRA-
DITION IS FINAL AND THAT IN ACCORDANCE WITH THE
CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF
AIRCRAFT, SIGNED AT THE HAGUE ON DECEMBER 16, 1970,
A CASE HAS BEEN OPENED AGAINST THE ACCUSED AT THE PAR-
QUET DE PARIS ON CHARGES OF THE ILLEGAL SEIZURE OF AN
AIRCRAFT AND RESTRAINT OF HOSTAGES UNDER THREAT. THE
EMBASSY TRUSTS THAT THESE PROCEEDINGS WILL RESULT,
IN THE EVENT THE ACCUSED ARE FOUND GUILTY, IN THE
APPLICATION OF A PENALTY WHICH IS PROPORTIONATE TO THE
SERIOUSNESS OF THE CRIME AND WHICH WILL FURTHER THE
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PURPOSES OF THE HAGUE CONVENTION TO DETER AIRCRAFT

HIJACKING.

C. THE INTERESTED OFFICIALS OF THE UNITED STATES GOVERNMENT HAVE NOW HAD THE OPPORTUNITY TO REVIEW THE DECISION OF THE CHAMBRE D'ACCUSATION ON THE REQUEST FOR EXTRADITION MADE BY THE UNITED STATES, AND THIS EMBASSY HAS BEEN INSTRUCTED TO BRING TO THE ATTENTION OF THE FOREIGN MINISTRY THE SERIOUS CONCERN OF THE UNITED STATES GOVERNMENT OVER THE REJECTION OF ITS EXTRADITION REQUEST.

D. IN THE VIEW OF THE UNITED STATES GOVERNMENT THE DECISION OF THE FRENCH GOVERNMENT IN THIS CASE TO DENY EXTRADITION ON THE SOLE GROUNDS OF AN ALLEGED POLITICAL MOTIVATION FOR THE CRIME IS INCONSISTENT WITH FRANCE'S OBLIGATIONS UNDER THE TREATY OF EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF FRANCE OF JANUARY 6, 1909, AS AMENDED BY THE SUPPLEMENTARY CONVENTION SIGNED AT PARIS ON FEBRUARY 12, 1970. IT IS CLEAR FROM THE LANGUAGE OF THE EXTRADITION TREATIES CITED ABOVE, AND FROM THE DECISION OF THE COUR D'APPEL OF PARIS, THAT THE UNITED STATES GOVERNMENT MADE THE SHOWING NECESSARY TO ESTABLISH FRANCE'S TREATY OBLIGATION TO SURRENDER THESE FUGITIVES FOR PROSECUTION IN THE UNITED STATES UNLESS THE DEFENSE ESTABLISHED BY APPROPRIATE EVIDENCE THAT THE "OFFENSE FOR WHICH THE INDIVIDUAL'S EXTRADITION IS REQUESTED IS OF A POLITICAL CHARACTER" AS STIPULATED IN ARTICLE VI OF THE 1909 CONVENTION AS AMENDED BY ARTICLE IV OF THE 1970 SUPPLEMENTARY CONVENTION. THAT ARTICLE PROVIDES FOR THIS DECISION TO BE MADE BY THE AUTHORITIES OF THE REQUESTED GOVERNMENT, BUT THE TREATY DOES NOT MAKE EXTRADITION DISCRETIONARY IN SUCH CASES. THE AUTHORITIES OF THE REQUESTED STATE ARE REQUIRED TO INTERPRET AND APPLY THE TREATY IN THE LIGHT OF THE RELEVANT FACTS AND IN ACCORDANCE WITH THE PERTINENT LEGAL DOCTRINES.

E. ALTHOUGH THE TREATY DOES NOT PRESCRIBE A SPECIFIC DEFINITION OF AN OFFENSE OF A "POLITICAL CHARACTER", AND INTERNATIONAL PRACTICE IS SOMEWHAT VARIED, THE CONSIDERABLE JURISPRUDENCE AND NUMEROUS CASES IN THIS FIELD CLEARLY ESTABLISH THAT MERE LIMITED OFFICIAL USE

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POLITICAL MOTIVE IS NOT SUFFICIENT TO CHARACTERIZE A SERIOUS COMMON CRIME AS A POLITICAL OFFENSE. THE LEGAL MEMORANDUM PROVIDED BY THE UNITED STATES GOVERNMENT IN THIS MATTER CITED CASES SUPPORTING THIS CONCLUSION IN THE COURTS OF FRANCE, THE UNITED STATES, BELGIUM, THE UNITED KINGDOM, GERMANY, AND SWITZERLAND. THE COURT OF APPEALS OF GRENOBLE STATED THE POINT, IN RE GIOVANNI GATTI, REPORT, RECUEIL SIREU, 1947,

II AT 48; (1947) ANNUAL DIGEST 145 (NO. 70):
"THE OFFENSE DOES NOT DERIVE ITS POLITICAL

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INFO OCT-01 EUR-12 ISO-00 SCA-01 JUSE-00 SS-15 NSC-05 SP-02

CIAE-00 INR-07 NSAE-00 /045 W
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FM AMEMBASSY PARIS
TO SECSTATE WASHDC PRIORITY 0471

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CHARACTER FROM THE MOTIVE OF THE OFFENDER BUT
FROM THE NATURE OF THE RIGHTS IT INJURES. THE
REASONS ON WHICH NON-EXTRADITION IS BASED DO NOT
PERMIT THE TAKING INTO ACCOUNT OF MERE MOTIVES
FOR THE PURPOSE OF ATTRIBUTING TO A COMMON CRIME
THE CHARACTER OF A POLITICAL OFFENSE."

F. IT IS SURPRISING THAT THE OPINION OF THE COUR
D'APPEL MADE NO REFERENCE TO ANY OF THE ARGUMENTS
MADE OR CASES CITED IN THE MEMORANDUM OF LAW SUBMITTED
BY THE UNITED STATES GOVERNMENT NOR TO ANY OTHER
JURISPRUDENCE. MOREOVER THERE IS NO INDICATION THAT
THE COURT GAVE ADEQUATE CONSIDERATION TO THE SERIOUS
NATURE OF THE OFFENSE OF AIRCRAFT HIJACKING, TO THE
UNIVERSAL CONDEMNATION OF SUCH OFFENSES BY THE INTER-
NATIONAL COMMUNITY OR TO THE MEASURES OF INTERNATIONAL
COOPERATION THAT HAVE BEEN TAKEN TO STEM THE TIDE OF
SUCH CRIMES. MOREOVER, IT WOULD APPEAR THAT THE COURT
BASED ITS CONCLUSION, IN LARGE PART, NOT ON EVIDENCE
BUT ON A MEMORANDUM OF DEFENSE COUNSEL WHICH THE
UNITED STATES GOVERNMENT WAS ALLOWED NO OPPORTUNITY
TO SEE, MUCH LESS TO REFUTE.

G. A STRONG CASE CAN BE MADE THAT SERIOUS CRIMES
SUCH AS AIRCRAFT HIJACKING ARE SO DANGEROUS TO HUMAN
LIFE AND SO INIMICAL TO INTERNATIONAL ORDER THAT THEY
SHOULD NOT BE REGARDED AS "POLITICAL OFFENSES" REGARD-
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LESS OF THE CIRCUMSTANCES. EVEN IF IT IS ASSUMED THAT
THERE ARE SPECIAL CIRCUMSTANCES IN WHICH AN ACT OF
HIJACKING MAY BE CONSIDERED TO HAVE A POLITICAL
CHARACTER, IT IS AN EXTREME POSITION TO ARGUE THAT THE
MERE PLEA OF POLITICAL MOTIVE IS SUFFICIENT TO ESTABLISH
THE POLITICAL NATURE OF THE OFFENSE. AS AN EXAMPLE OF
A MORE MODERATE POSITION ON THIS ISSUE, AND ONE WHICH
REFLECTS EMERGING STATE PRACTICE, MAY BE CITED THE
MEMORANDUM OF UNDERSTANDING ON HIJACKING OF AIRCRAFT
AND VESSELS AND OTHER OFFENSES BETWEEN THE UNITED
STATES AND CUBA SIGNED FEBRUARY 15, 1973. THIS MEMO-
RANDUM PROVIDES THAT THE RECEIVING STATE MAY TAKE INTO
CONSIDERATION MITIGATING CIRCUMSTANCES SOLELY WHERE
THE FUGITIVES "WERE BEING SOUGHT FOR STRICTLY POLITICAL
REASONS AND WERE IN REAL AND EMINENT DANGER OF DEATH
WITHOUT A VIABLE ALTERNATIVE FOR LEAVING THE COUNTRY,
PROVIDED THERE WAS NO FINANCIAL EXTORTION OR PHYSICAL
INJURY TO THE MEMBERS OF THE CREW, PASSENGERS, OR OTHER
PERSONS IN CONNECTION WITH THE HIJACKING."

H. THE EFFECT OF THE DECISION BY THE COUR D'APPEL IS
TO CONSTRUE HIJACKING AS A "POLITICAL OFFENSE" IN ANY
CASE IN WHICH A POLITICAL MOTIVE IS ALLEGED, EVEN WHERE
LARGE SUMS OF MONEY ARE EXTORTED UNDER THE THREAT OF
MURDER OF THE PASSENGERS AND CREW. THE EFFECT OF THE
DECISION IN THIS CASE IF IT WERE FOLLOWED BY OTHER
STATES, WOULD BE VIRTUALLY TO ELIMINATE EXTRADITION AS A
REMEDY IN HIJACKING CASES, AND BY SUPPRESSING THE MOST
EFFECTIVE DETERRENT TO AIRCRAFT HIJACKING, WOULD
ENCOURAGE THE COMMISSION OF MORE SUCH CRIMES IN THE
FUTURE.

I. THE GOVERNMENT OF THE UNITED STATES OF
AMERICA, AWARE THAT THE GOVERNMENT OF FRANCE ABHORS
HIJACKING NO LESS THAN ITSELF, EARNESTLY REQUESTS THE
GOVERNMENT OF FRANCE TO CONSIDER THE SERIOUS IMPLICATIONS
OF THIS PRECEDENT. THE EMBASSY WOULD WELCOME THE VIEWS
OF THE FOREIGN MINISTRY ON THE PROBLEM OF THE HANDLING
OF POSSIBLE FUTURE EXTRADITION REQUESTS INVOLVING
HIJACKING CASES TO ASSURE THAT THE FULL INTENT OF THE
PROVISIONS OF THE EXTRADITION TREATY AND SUPPLEMENTAL
CONVENTION IS ACHIEVED.

J. THE EMBASSY... (CLOSE TEXT).
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Message Attributes

Automatic Decaptoning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: EXTRADITION, DIPLOMATIC PROTESTS, DIPLOMATIC NOTES, NEGOTIATIONS
Control Number: n/a
Copy: SINGLE
Draft Date: 17 JUN 1975
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: MorefiRH
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1975PARIS15672
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: D750211-0292
From: PARIS
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1975/newtext/t19750643/aaaabmpf.tel
Line Count: 227
Locator: TEXT ON-LINE, ON MICROFILM
Office: ACTION L
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 5
Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: 75 PARIS 15671
Review Action: RELEASED, APPROVED
Review Authority: MorefiRH
Review Comment: n/a
Review Content Flags:
Review Date: 14 MAY 2003
Review Event:
Review Exemptions: n/a
Review History: RELEASED <14 MAY 2003 by MartinML>; APPROVED <15 MAY 2003 by MorefiRH>
Review Markings:

Margaret P. Grafeld
Declassified/Released
US Department of State
EO Systematic Review
06 JUL 2006

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: HOLDER-KERKOW EXTRADITION
TAGS: CPRS, PFOR, FR, US, (HOLDER, WILLIE ROGER), (KERKOW, CATHERINE MARIE)
To: STATE
Type: TE
Markings: Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 06 JUL 2006